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ABSTRACT

Exemption 1 of the Freedom of Information Act provides for the secret classification of matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." As such, it provides a formidable barrier to the inquisitive citizen or Congress seeking the disclosure of secret documents. The 1974 amendments to the act have partially diminished this barrier, but are inadequate. In chambers inspection of documents should be made mandatory, and counsel for the party seeking disclosure should be allowed to see the disputed papers. Document classification must be revamped and reform along the lines proposed by Senator Mike Gravel is needed to put an end to rampant overclassification. To ensure that the nation's legislators have access to foreign policy and defense information deemed too sensitive for public circulation, Congress must attempt to deflate claims for executive privilege by taking the constitutional battle to the courts, if necessary. (KS)

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STIFLING THE RIGHT TO KNOW:

Exemption 1 and Executive Privilege

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According to testimony before the House Subcommittee on Government Information, 90 to 99.5 per cent of classified U.S. documents should not be classified.[1] This means that the American public is unnecessarily forbidden access to millions of pages of information about national defense and foreign policy matters. The public's right to know about these areas is seriously infringed.[2]

Citizens should have sufficient information to evaluate government policy. Basically, the public, and therefore the press, should have access to everything that would not pose a direct threat to the nation's security or reveal particular strategies to be used in foreign negotiations. The people's representatives in Congress should have, in addition, access to the excluded areas.

In the effort to obtain classified information, citizens and members of Congress are aided by the Freedom of Information Act.[3] Congress, moreover, can argue that the Constitution gives it additional rights of access.

Although the Freedom of Information Act is the chief legal tool which citizens have for gaining access to classified materials, it is an imperfect tool. Although the act mandates disclosure of a broad range of government records, subsection (b) (1) exempts from the act's provisions matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."[4]

The only hope, then, for providing adequate access in the face of an executive branch which resorts to the exemption, known as exemption 1, is to repeal the exemption or to permit judicial review of the executive's determination that secrecy is required. Repeal is unlikely, but there is a foundation for obtaining independent review.

Until Congress amended the Freedom of Information Act in 1974, the foundation was decidedly shaky because of the Supreme Court decision in the 1973

case Environmental Protection Agency v. Mink.[5] The court interpreted exemption 1 to mean that any material classified pursuant to President Eisenhower's Executive Order 10501, amended by President Nixon in 1972, is excluded automatically from public inspection. Under the decision, a federal judge could not inspect classified documents in camera--that is, in chambers--to decide whether release would endanger national security. Nor could he look at documents or portions of documents classified solely because they were in the same file with classified material. The court, however, did extend by implication an invitation to Congress to change exemption 1 if that body did wish to allow judicial review of classified information requested by the public.

In deciding exemption 1 claims since Mink, the courts unfailingly have upheld the government's refusals to disclose classified information.[6] In the reported cases, the government has not claimed the exemption for nonclassified materials.

In October of last year, Congress acted on the Supreme Court's suggestion by amending exemption 1 to allow judges to inspect classified documents involved in Freedom of Information cases. In November, Congress repassed the amendment over President Ford's veto.

Even with the amended version of exemption 1, citizens still will face considerable difficulty in obtaining adequate access to information on defense and foreign policy matters. In approving the amendment, Congress emphasized that in camera inspection is permitted, but not mandatory, in exemption 1 cases. The conference report states: "Before the court orders in camera inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure."[7] The report added that the Congress expected the courts to

"accord substantial weight" to such affidavits.[8]

Even when in camera inspection is granted, the party seeking release of classified material is still at a disadvantage because his attorney is not allowed to see the disputed documents. In a 1973 case, Vaughn v. Rosen, the District of Columbia Court of Appeals acknowledged that private inspection of records by a judge violates the basic precepts of an adversary proceeding.[9] A remedy, proposed by the 1973 Chief Justice Earl Warren Conference on Advocacy in the United States, is to allow a special counsel, who is acceptable to the plaintiff, and who meets the government's security qualifications, to have access to the documents.[10]

Another way to improve public access to information on national defense and foreign policy is to halt overclassification and to declassify much of what is now kept secret. The basics of the present classification system were established by Eisenhower's Executive Order 10501. According to the order, the Top Secret stamp is to be given to any material whose disclosure could "reasonably be expected to cause exceptionally grave damage to the national security," the Secret stamp to that which if disclosed would cause serious damage to the national security, and the Confidential label to materials whose release would simply damage the national security. Today, government's classified files contain millions of pages, stored and maintained at an annual cost of $60 to $80 million.[11]

President Nixon responded to some of the criticism of classification by promulgating Executive Order 11652 in March 1972. The new order directed each agency to index its classified documents, and it established an Interagency Classification Review Board reporting to the White House. Agencies also were directed to classify portions of documents instead of giving blanket classi-

fications to whole documents. Declassification was to be accelerated by placing documents into categories ensuring automatic declassification after a certain number of years elapsed. However, a document could be exempted from the automatic declassification schedule if a reason were given. While Nixon's order reduced by eleven the number of agencies empowered to classify, it liberalized the delegation of classification authority in the remaining thirty-six agencies. Another serious defect is the lodging of classification review solidly within the executive branch.

Although the number of persons authorized to classify has dropped from nearly 60,000 in 1972 to about one quarter that now, the number is still great.[12] These people are under no sanction for classifying that which does not need to be classified, but they can suffer severe penalties for disclosing national defense matters. Their decisions frequently are shielded further by claims of executive privilege. As a result, the system can become a means of hiding mistakes or misdeeds and of generally keeping the public's nose out of government affairs.[13]

As a result of dissatisfaction with President Nixon's order, members of the 93rd Congress introduced a number of bills to provide congressional oversight and, in a few cases, drastic overhaul of the classification system.[14] Perhaps the most radical measures are those sponsored by Senator Mike Gravel. He would allow only defense information to be classified and then only when "its unauthorized disclosure would adversely affect the ability of the United States to protect and defend itself against overt and covert hostile action."[15] His bills, S.R. 1726 and S.R. 2451, would limit original classification authority and require automatic declassification after two years unless compelling reasons existed for continued classification. A centralized cross-indexed

file would be established to provide complete descriptions of classified documents, and public notice would be given of declassification. The new classification system would be reviewed by the General Accounting Office.

If Gravel's bills were passed, citizens would have adequate access to national defense and foreign policy information, when adequate is defined as that information the public must have to evaluate government policy. Adequate congressional access, however, still could be thwarted by executive privilege. Recent presidents and their subordinates have used executive privilege to cut off congressional access to not only classified materials, but many other sources of information as well. The Nixon administration used it, for instance, to protect information from FBI files and to reject requests from the Senate Foreign Relations Committee for a military assistance plan. Executive privilege also was cited in denying the request of the House Government Information Subcommittee for a report on U.S. aid to Cambodia and for an executive study of the classification system. Of course, Nixon's most notorious claim of executive privilege was not directed at eluding Congress, but rather at evading a grand jury subpoena for tapes of conversations concerning the Watergate coverup.[16]

The Supreme Court's decision in United States v. Nixon, forcing the surrender of the tapes, has put a sizable dent in the doctrine of executive privilege.[17] This, coupled with a post-Watergate deflation of the executive image, should mean that an assertive Congress could deal the practice a lethal blow. Not only can Congress point to a solid line of supporting judicial precedents, and the U.S. Constitution, but it has a sheaf of executive abuses to fortify its case.

In attempting to halt presidential attempts to withhold information from its committees, Congress will encounter a number of well-worn counter-

arguments. There is the idea that executive privilege is undergirded by the constitutional doctrine of separation of powers. The proponents of executive privilege also point to practice as precedent--in other words, a number of presidents have invoked executive privilege with impunity; therefore, it must be an accepted principle. Finally, they speak of the practical need for the privilege if the bureaucracy is to function effectively.

First let's consider the separation of powers argument. Foremost in the argument that the legislature has power over the executive is the impeachment power. By assigning the impeachment power to Congress, the Constitution made the executive accountable to the legislative branch. It did not make the legislature similarly accountable to the executive. The Constitution was framed in an era in which experience with the English king and with colonial governors fostered popular distrust of the executive. All central government was distrusted to some extent, but more confidence was lodged in the elected representatives with local ties who composed the legislature.[17]

Moreover, the President's conduct is subject to the congressional power of inquiry. As the nation's lawmaker, Congress was authorized to obtain information for legislating and for determining if the laws are being implemented once enacted. Since the executive is charged with faithfully executing the laws, he is answerable to Congress in this respect.[18]

The idea that separation of powers gives the executive any <u>implied</u> privileges was squashed by the district court ruling on the Nixon tapes and then shored up again by the Supreme Court decision. In support of its decision, the district court quoted Charles Pinckney, South Carolina delegate to the Constitutional Convention, as telling the U.S. Senate that the Constitution "...never was intended to give Congress or either branch, any but specified, and those

very limited privileges indeed....They [Framers] knew that in free countries very few privileges were necessary to the undisturbed exercise of legislative duties, and those few only they determined Congress should possess."[19] John Marshall, in United States v. Burr, stated that in the face of a strong English parliamentary tradition against executive privilege that the Constitution would have been expected to specify that the executive was privileged from congressional inquiry if the Framers had so intended.[20]

What about claims that the executive's privilege stems from the enumerated powers? The president was given a qualified veto of legislative action and the power to appoint government officials and to execute the laws. In the field of defense and foreign policy, he was given more express duties: to act as commander-in-chief of the armies and "to make Treaties by and with the Advice and Consent of the Senate."[21] The roles of commander-in-chief and treaty-maker have been frequently relied upon as support for executive privilege in the field of foreign relations and defense. But the Constitution said Congress shall have the power to declare war, and even the conduct of the war is subject to congressional purview because Congress foots the bill under its constitutional charge to "provide for the common defense."[22] The treaty clause makes treaty-making a joint responsibility of President and Congress. The advice and consent phrase, borrowed from parliamentary practice, implies a very active participatory role for the legislature in treaty formulation. Moreover, Congress' legislative powers and spending powers extend to foreign affairs.[23]

In Nixon v. Sirica, the appeals court pointed to a portion of the Brandeis dissent in Myers v. United States.[24] Said Brandeis:

> The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

However, in United States v. Nixon, the Supreme Court said:

> Certain powers and privileges flow from the nature of the enumerated powers; the protection of the confidentiality of presidential communications has similar constitutional underpinnings....The expectation of a president to the confidentiality of his conversations and correspondence...has all the values to which we accord deference for the privacy of all citizens, and added to those values the necessity for protection of the public interest in candid, objective and even blunt or harsh opinions in presidential decision-making.... These are the considerations justifying a presumptive privilege in presidential communications.[25]

It is not clear what these decisions imply for congressional access to executive deliberations and documents. However, they are somewhat favorable precedents since the Supreme Court has resisted claims of absolute privilege, and it did force Nixon to surrender his tapes to a federal judge, despite agreeing with Nixon's argument, because there was no alternative available for the evidence the President held.

The decisions of the district court, the appeals court and the Supreme Court in the case of the Nixon tapes should put to rest the idea that the President is granted immunity from the laws. As part of the argument that the Constitution does not give the executive any special privileges or immunities, the appeals court said:

> ...Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen. Nor does the impeachment clause imply immunity from routine court process.[26]

The appeals court further emphasized that it is up to the court to determine "the validity of the assertion and the scope of the privilege....To leave the proper scope and application of executive privilege to the President's sole discretion would represent a mixing, rather than a separation of executive and judicial functions."[27] The Supreme Court said:

> Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it follows that the court has authority to interpret claims with respect to powers alleged to derive from enumerated powers.[28]

The appeals court noted a long line of decisions in which "courts have assumed that they have the power to enter mandatory orders to executive officials to compel production of evidence."[29]

So much for the constitutional status of executive privilege. What about the argument that since the executive has historically exercised a good deal of authority in foreign relations and defense, he has established special rights to control these areas? This was Attorney General William Rogers' contention in a 1958 memo written to justify Eisenhower's refusal to allow his subordinates to testify before Congress. Rogers argued that executive privilege is supported by "150 years of congressional acquiescence." But Rogers ignores a lengthy list of congressional investigations of the executive during the first hundred years and seems to forget his own statement that requested information was withheld only infrequently until recent times.[30]

It is possible, of course, that some member of Congress might divulge to the public foreign policy or national defense information which should have been kept restricted. However, the two houses can reduce such breaches by censuring anyone who abuses the privilege of access. There is also the possibility that Congress will use information it obtains from the executive to defame individuals. Withholding information from Congress may be legitimate in such cases, but when defamatory material is requested, the decision about what is to be disclosed should lie with the courts.

In sum, ensuring adequate access to government information on defense and foreign relations will require concerted action by information seekers,

the federal courts and the Congress. The formidable barrier which exemption 1 of the Freedom of Information Act presents to the inquisitive citizen has been diminished by the 1974 amendments to the act. But the amendments do not go far enough. In camera inspection should probably be made mandatory, and counsel for the party seeking disclosure be allowed to see the disputed documents. The classification system must be revamped; reform along the lines proposed by Senator Mike Gravel is urgently needed to put an end to rampant overclassification. To ensure that the nation's legislators have access to foreign policy and defense information deemed too sensitive for public circulation, Congress must attempt to deflate overblown claims for executive privilege by taking the constitutional battle to the courts, if necessary.

Perhaps some diminishing of national security will result from revealing more government records. But as Francis Rourke, political science professor at Johns Hopkins University, has pointed out:

> ...Since democratic communities exist to serve other values besides national security, the extent to which the practice of withholding information furthers security must always be measured against the possibility that it may at the same time exact so high a price in terms of other values, which are equally central to the well-being of a democratic community that it simply cannot be justified.[31]

FOOTNOTES

1 U.S., Congress, House, Committee on Government Operations, Hearings on H.R. 5425 and H.R. 4960 before the Foreign Operations and Government Information Subcommittee To Amend the Freedom of Information Act and To Establish a Freedom of Information Commission, 93rd Congress, 1st Sess., 1973 (hereinafter referred to as 1973 Moorhead hearings), p.228. Carol M. Barker and Matthew H. Fox, Classified Files: The Yellowing Pages (New York: Twentieth Century Fund, 1972), p. 72.

2 For discussion of the people's "right to know" see Thomas Jefferson, The Political Writings of Thomas Jefferson, ed. Edward Dumbauld (Indianapolis: Bobbs-Merrill, 1955), p. 93, and Thomas Emerson, Toward a General Theory of the First Amendment (New York: Vintage, 1966), pp. 10, 112.

The right to know has been reinforced by numerous Supreme Court decisions. New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, L.Ed. 2d 686 (1964), reviews the court's stand. This study adopts Emerson's argument that "[f]ull and open discussion of matters relating to war and defense are, if anything, more vital to the life of a democracy than any other area." Emerson, p. 86.

3 5 U.S. Code sec. 552.

4 5 U.S. Code sec. 552.

5 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed. 2d 119 (1973).

6 Wolfe v. Froehlke, 358 F. Supp. 1318 (D.C.C. 1973); Moss v. Laird, __ F. Supp. __ (D.C.C. 1971), synopsis in U.S., Congress, Senate, Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Freedom of Information Source Book: Legislative Materials, Cases, Articles, 93rd Cong., 2d Sess., 1974, Doc. 93-82, p. 160; Soucie v. David, 448 F. 2d 1067 (D.C. C. 1971). In Soucie, the government had not claimed exemption 1 as authority for withholding the documents in question. However, in remanding the case to the district court, the appeals court apparently wished to cover that eventuality.

7 U.S., Congress, Senate, Freedom of Information Act Amendments, 93rd Cong., 2d Sess., 1974, Conf. Rept. 93-1200 to accompany H.R. 12471, pp. 9, 12.

8 Ibid., p. 12.

9 484 F. 2d 820 (D.C.C. 1973).

10 The proposal is contained in the final report of the conference, June 8-9, 1973, sponsored by the Roscoe Pound-American Trial Lawyers Foundation, published in Paul Wallace Jr., The Freedom of Information Act: Background, Judicial Construction, Selected Bibliography and Pending Proposals to Amend the Act, Congressional Research Service, Library of Congress, March 23, 1974, p. 43.

11 U.S., Congress, House, Committee on Armed Services, Hearings on the Proper Classification and Handling of Government Information involving the National Security and H.R. 9853 before the Special Subcommittee on Intelligence, 92nd Cong., 2d Sess., 1972, p. 17538 from a 1972 statement by Rep. John S. Monagan.

For estimates of the magnitude of classified information, see pp. 17595, 17616 and 17645.

12 Milwaukee Journal, p. 20, June 15, 1975.

13 See comments of Sen. William Roth, R.-Del., and those of Sen. Edmund Muskie, D.-Maine, U.S., Congress, Senate, Subcommittee on Intergovernmental Relations, Legislation on Government Secrecy, Government Operations Committee Prints, 93rd Cong., 2d Sess., 1974, S402-16, vol. 5, p. 3.

14 S.R. 2965, H.R. 9853, S.R. 1520 and S.R. 3399, for instance. Similar legislation is being introduced in the 94th Congress.

15 5S402-16, p. viii.

16 Barker and Fox, p. 8. 5S402-16, p. 16.

17 The Federalist Papers, ed. Roy P. Fairfield (Garden City, N.Y.: Doubleday, 1966), p. 160. Raoul Berger, Executive Privilege: A Constitutional Myth (Cambridge, Mass.: Harvard University Press, 1974), p. 3.

18 Article II, section 3. See Berger, pp. 3, 11, 15-48. Congress' power to probe executive conduct has been buttressed by court decisions such as McGrain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927); and Watkins v. United States, 354 U.S. 178, 77 S.Ct. 1173, 1 L. Ed. 2d 1273 (1957).

19 In Re Subpoena to Nixon, 360 F. Supp. 1 (D.C.C. 1973), p. 7.

20 25 Fed. Cas. 55, 165 (No. 14693) (Cir. Ct. Va. 1807), cited in Nixon v. Sirica, 487 F. 2d at 711 (D.C.C. 1973).

21 Article II, section 2. See Federalist Papers, No. 69, pp. 192-197.

22 Berger, pp. 64, 67.

23 See Thomas Franck's testimony, 1973 Moorhead hearings, p. 185. See Louis Henkin's comments, Berger, p. 122.

24 272 U.S. at 293, cited in Nixon v. Sirica, 487 F. 2d n.73.

25 94 S.Ct. at 3106, 3107.

26 487 F. 2d at 711.

27 487 F. 2d at 700. The court cited United States v. Reynolds, 345 U.S. 1, 8, 73 S. Ct. 528, 97 L. Ed. 2d 727 (1952).

28 94 S. Ct. at 3105.

29 487 F.2d at 708.

30 Berger, p. 45.

31 Francis Rourke, Secrecy and Publicity (Baltimore: The Johns Hopkins Press, 1961), p. 225.